Supreme Court, U.S.
FILED
JUN 30 1995
OFFICE OF THE CLERK

(2)

No. 94-2006

In The
**SUPREME COURT OF THE UNITED STATES**

October Term, 1994

Hopewell Cogeneration Limited Partnership, et al.,
*Petitioners,*

*v.*

State Corporation Commission,
*Respondent.*

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

# BRIEF IN OPPOSITION

Stewart E. Farrar
Solicitor General
Anthony J. Gambardella
General Counsel
Wayne N. Smith
Senior Counsel
*(Counsel of Record)*
Vishwa B. Bhargava
Attorney
State Corporation Commission
Office of General Counsel
P.O. Box 1197
Richmond, Virginia 23209-1197
(804) 371-9671

June 30, 1995

BEST AVAILABLE COPY

2008

## QUESTION PRESENTED

**Whether states must require customers of an electric utility to reimburse the utility for a portion of payments to qualifying cogeneration and small power production facilities, which portion is concededly not an avoided cost.**

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Table of Contents | ii |
| Table of Authorities | iii |
| Statement of the Case | 1 |
| Reasons to Deny the Petition for Writ of Certiorari | 4 |
| A. The Virginia Decision Involves No State Action Which Interferes With Federal Policy | 5 |
| B. There Is No Conflict Between the Decision of the Virginia Supreme Court and Any of the Decisions Cited by Petitioners | 6 |
| 1. Rulings in the Ninth and Third Circuits Are Not Applicable to the Case at Bar | 7 |
| 2. Petitioners' Cited State Court Rulings Are Also Distinguishable | 11 |
| 3. There Is No Conflict Between the Virginia Supreme Court and the FERC | 13 |
| Conclusion | 15 |

## TABLE OF AUTHORITIES


Page

**Federal Cases**

*American Paper Inst. v. American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983) ..... 13

*Freehold Cogeneration Associates v. Board of Regulatory Comm'rs*, 44 F.3d 1178 (3rd Cir. 1995), *petition for cert. filed*, U.S.L.W. (U.S. June 2, 1995) (No. 94-1977) ..... 8-11

*Independent Energy Producers Ass'n v. California P.U.C.*, 36 F.3d 848 (9th Cir. 1994) ..... 7, 14

*Morton v. Ruiz*, 415 U.S. 199 (1974) ..... 13

**State Cases**

*Smith Cogeneration Management, Inc. v. Corporation Comm'n*, 863 P.2d 1227 (Okla. 1993) ..... 11

*West Penn Power Co. v. Pennsylvania Pub. Util. Comm'n*, 623 A.2d 383 (Pa. Commw. Ct. 1993) ..... 11-12

**Administrative Decisions**

*Connecticut Light & Power Co.*, 70 F.E.R.C. ¶ 61,012, *recons. denied*, 71 F.E.R.C. ¶ 61,035 (1995), *appeal docketed sub nom. Niagara Mohawk Power Corp. v. FERC*, No. 95-1222 (D.C. Cir. Apr. 24, 1995) ..... 13-15

*Southern Cal. Edison Co.*, 70 F.E.R.C. ¶ 61,215, *recons. granted in part and denied in part*, 71 F.E.R.C. ¶ 61,269 (1995) ..... 13, 15

**Statutes**

§ 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 (1988 & Supp. V 1993) ..... passim

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1994

---

Hopewell Cogeneration Limited Partnership, et al.,
*Petitioners,*

*v.*

State Corporation Commission,
*Respondent.*

---

# BRIEF IN OPPOSITION

---

## STATEMENT OF THE CASE

This proceeding began on May 29, 1992, when Virginia Electric and Power Company (hereinafter "Virginia Power") applied to the State Corporation Commission of Virginia (hereinafter "Corporation Commission") for a general increase in electric rates for retail service. Initially, the utility sought $314.6 million in additional annual revenue from Virginia residential, business, and industrial consumers. (Petition for Writ of Certiorari, Appendix at 32a-33a, hereinafter "Pet. App.") At no time during the proceeding did the Corporation Commission in any way assert, or purport to assert, authority to change any contracted amount paid by the utility to a qualifying facility (hereinafter "QF"). (Pet. App. at 67a, 78a.) Its sole action was to modify electric rates charged to retail customers, an action which is clearly authorized by state law. (Pet. App. at 9a-11a.)

As provided by § 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 (1988 & Supp. V 1993) (hereinafter "PURPA") and the Federal Energy Regulatory

Commission's (hereinafter "FERC") implementing regulations, the Petitioners had contracted to sell electricity to Virginia Power. The Petitioners had exercised the option provided by FERC regulations of contracting to provide electricity for payments not to exceed Virginia Power's avoided cost calculated as of the time of entering into their contracts. (Petition for Writ of Certiorari at 3-4, hereinafter "Pet.") These contracts were negotiated at arms-length. They were filed with the Corporation Commission, but none were formally reviewed or approved by the Corporation Commission. (Pet. at 5; Pet. App. at 23a.)

The Petitioners, along with other QFs, participated in the case below. (Pet. at 7.) In the Corporation Commission proceeding, it was established that Virginia Power and some QFs, including the Petitioners, had negotiated contract payments for electricity which included amounts for gross receipts taxes (hereinafter "GRT") assessed on the utility's resale of the purchased electricity. The negotiated payments to these QFs, including Petitioners, were purported to be based on Virginia Power's avoided costs as defined by PURPA. (Pet. App. at 65a.) The Corporation Commission determined, however, that GRT could not be an avoided cost since Virginia Power incurred the tax on its revenues from retail sales of electricity regardless of the source of the electricity. Under state tax law, Virginia Power must pay the taxes whether it generates the electricity or purchases it from a QF for resale. (Pet. App. at 4a-5a, 65a.) Virginia Power and the Petitioners here agreed that GRT should not have been included in the calculation of avoided cost. (Pet. App. at 7a, 65a.) The Corporation Commission found that GRT had been included in error. (Pet. App. at 65a-66a.)

The Corporation Commission held Virginia Power responsible for the error. It found that the utility should have known that it could not avoid GRT when electricity was purchased from a QF for resale to end users. (Pet. App. at 66a, 78a-79a.) No other aspect of the Petitioners' contracts was considered by the Corporation Commission. (Pet. App. at 78a.)

Inaction by the Corporation Commission would have resulted in a double recovery by Virginia Power of a portion of its gross receipts tax expense from Virginia retail ratepayers. The first recovery would have been as taxes included directly in Virginia Power's operating expenses. To the extent that GRT expenses were also included in contract payments made to QFs, Virginia Power would again have been reimbursed for the same tax through its expense for purchased electricity. (Pet. App. at 10a n.5, 66a.) To avoid this double recovery, the Corporation Commission reduced the level of Virginia Power's expense for electricity purchased from QFs to be recovered in retail rates. (Pet. App. at 65a-66a, 69a, 79a.) This adjustment reduced the retail rate increase approved in the proceeding.

The Corporation Commission's action operated only to modify Virginia Power's retail electric rates. The Commission did not reform any QF contract, and it acknowledged that Virginia Power and Petitioners were free to interpret, modify or enforce the provisions of their negotiated contracts as they deemed appropriate. (Pet. App. at 67a, 78a.)

In addition, the Corporation Commission carefully delineated the specific contracts covered by the disallowance. A total of 58 QF contracts which included GRT in the calculation of avoided cost were identified, and approximately $4.2 million of the annual payments made under these contracts was at issue. (Pet. App. at 5a n.2, 24a-26a, 67a-68a.) However, the ratemaking disallowance was not applied to Virginia Power's payments made pursuant to any contract reviewed, approved, and ordered by the Corporation Commission or by FERC. The Corporation Commission found it would be unfair to disallow any portion of a payment which had been subject to regulatory review, even if inclusion of the expense was otherwise improper. (Pet. App. at 68a, 78a.) This limitation led to a disallowance of approximately two million dollars from recovery in retail rates. (Pet. App. at 6a n.3, 26a, 78a.) After making this disallowance

and other unrelated ratemaking adjustments, the Corporation Commission authorized Virginia Power to increase its rates for retail service by $241.9 million. (Pet. App. at 69a.)[1]

Petitioners and other parties appealed to the Virginia Supreme Court for review of the Corporation Commission's decision. The Virginia Supreme Court affirmed that decision.[2] The court found the record supported the Corporation Commission's determination that the capacity expense based on GRT was excessive and should be disallowed. (Pet. App. at 9a-11a.) Like the Corporation Commission, the Virginia Supreme Court did not reach any question concerning reformation of the contracts between Virginia Power and Petitioners. (Pet. App. at 67a.)

## REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari should be denied. First, there is no question properly before the Court concerning whether Petitioners' contracts with Virginia Power should be reformed. Neither the Corporation Commission nor the Virginia Supreme Court reached any such question. Second, a full analysis of the decision of the Virginia Supreme Court will show that there is no conflict with the decisions of U. S. Courts of Appeal, state courts, or the FERC. The factual and procedural issues addressed by the Virginia Supreme Court were unlike any addressed by other courts or the FERC.

---

[1] Thus, the $2 million ratemaking disallowance for capacity payments was less than 1% of the revenue increase ultimately allowed by the Corporation Commission. Petitioners state that the amount of the disallowance is "approximately 2% of each producer's capacity payments." (Pet. at 7 n.4.)

[2] The Virginia Supreme Court subsequently denied Petitions for Rehearing. (Pet. App. at 20a.)

### A. The Virginia Decision Involves No State Action Which Interferes With Federal Policy

There are two salient aspects of this case which distinguish it from any cited by Petitioners. First, the Petitioners concede that the GRT portion of Virginia Power's capacity payments, which the Corporation Commission excluded from recovery in electric rates, was not avoided because the power was purchased from Petitioners rather than generated by Virginia Power itself. The disallowed portion of the payments was not an avoided cost. Second, neither the Corporation Commission nor the Virginia Supreme Court attempted to modify Petitioners' voluntary contracts with Virginia Power. Only the rates paid the utility by Virginia electric customers, not the contract amounts Virginia Power pays to Petitioners, were changed by the decision.

Thus, Petitioners seek review of an extraordinarily narrow decision. This case is not of the genre cited by Petitioners in which a state undertakes a broad re-examination of avoided costs and attempts to modify power supply contracts based on the re-examination.[3] Here, the Corporation Commission undertook no broad re-examination of avoided costs calculations; nor did it attempt to reform Petitioners' contracts with Virginia Power. Rather, it acted to protect retail electric customers, in a precise and appropriate manner, from an error made by the contracting parties. Avoided costs were not re-examined, but the Corporation Commission did not permit the recovery of an unavoidable cost under the mistaken notion that it was avoided.

Neither the Corporation Commission nor the Virginia Supreme Court barred Virginia Power from continuing to pay the

---

[3] As discussed hereafter, most of the cases cited by Petitioners fall into this pattern. Presumably, the theory of such states is that avoided costs have fallen drastically over time and that power supply contracts must be reformed so electric rates can be reduced.

previously established contractual charges.[4] Thus, this case is solely a state ratemaking decision, not an attempt to challenge any PURPA requirement as to the payments made under the contracts.[5]

This case involved no broad re-examination of the implementation of PURPA in Virginia, unlike the cases from other states cited by Petitioners. It turns on a narrow point of state ratemaking, and the Petitioners' contracts may not be affected at all. Thus, the decision below is not an example of state interference with federal policy under PURPA.

### B. There Is No Conflict Between the Decision of the Virginia Supreme Court and Any of the Decisions Cited by Petitioners

Recently, a number of states have begun to challenge directly previous calculations of avoided costs. No such challenge has been mounted by Virginia. Thus, there is no conflict among decisions which requires any resolution by this Court. Whether or not states have the authority to mount such a challenge, the result in this case would remain the same because no such challenge has been made here.

---

[4] Nothing prevents Petitioners and Virginia Power from continuing to implement the payments now required by the contracts or modifying their contracts, if necessary, to accomplish this result.

[5] Indeed, this case is an attempt to implement PURPA's policy that, regardless of cogeneration or small power production, electric rates must continue to be just and reasonable for retail electric customers. 16 U.S.C. § 824a-3(b)(1) (1988 & Supp. V 1993). Electric rates which collect GRT twice are not just and reasonable. PURPA was clearly not intended to perpetuate conceded errors by contracting parties which harm electric customers.

### 1. Rulings in the Ninth and Third Circuits Are Not Applicable to the Case at Bar

Petitioners argue that the holding in *Independent Energy Producers Association v. California Public Utilities Commission*, 36 F.3d 848 (9th Cir. 1994) (hereinafter "*IEPA*"), controls the present case. This contention is incorrect because that case involves a broad state intrusion directly into the contractual relationship between the utility and its power suppliers. There is no regulation of that relationship in the case at bar.

In *IEPA*, the California Public Utilities Commission (hereinafter "CPUC") attempted to implement a program which authorized the utilities to monitor the QFs' compliance with FERC operating and efficiency standards. If the utilities determined that the QF did not meet these FERC standards, the utilities were authorized by the state commission to suspend contract payments between the utility and its power suppliers. Further, the utilities could substitute for the contract payment a lower, "alternate," payment equal to 80% of avoided cost. *Id.* at 850-51.

The Court of Appeals for the Ninth Circuit found that the CPUC program was preempted by PURPA. The CPUC could not authorize the utilities to determine a QF's compliance with federal operating and efficiency standards. Under PURPA, the program was also preempted from reducing contractual rates. *Id.* at 859.

Unlike the Corporation Commission in the case at bar, the CPUC authorized the utilities to consider QF operations and to adjust contract payments between the utility and the QF, thereby intruding into areas of exclusive federal regulation. Here, the Corporation Commission acted only in a retail ratemaking proceeding to prevent an unavoidable cost, GRT, from being passed along to ratepayers twice. (Pet. App. at 65a.) It did not attempt any modification of power supply contracts. It changed only retail electric rates. The actions of the Corporation Commission fall squarely within state ratemaking authority.

Furthermore, the CPUC program called for reducing payments to QFs to 80% of the contract rate if the QF did not comply with federal efficiency standards. Thus, it explicitly sought to modify the avoided costs paid under the contracts. In contrast, in this case all the parties agreed that the GRT excluded from electric rates was not a component of avoided costs. The Corporation Commission did not attempt to prevent the payment of avoided costs by a utility to a QF.

In fact, it is unclear what effect, if any, there will be on the Petitioners, since the Corporation Commission's decision directly affected only Virginia Power and the rates it passed on to ratepayers.[6] Clearly, California intervened extensively to modify the relationship between utilities and their power suppliers. Here, Virginia has not attempted to change that relationship at all.

Petitioners also argue that the Third Circuit decision in *Freehold Cogeneration Associates v. Board of Regulatory Commissioners*, 44 F.3d 1178 (3rd Cir. 1995), *petition for cert. filed*, 63 U.S.L.W. 3874 (U.S. June 2, 1995) (No. 94-1977), is applicable to the present case. In that proceeding, Freehold Cogeneration Associates (hereinafter "Freehold") sought a declaratory judgment that the New Jersey Board of Regulatory Commissioners (hereinafter "BRC") was preempted by PURPA from modifying the terms of previously approved contracts between Freehold, a QF, and a New Jersey public utility. The District Court for the District of New Jersey granted BRC's

---

[6] A decision by the Court at this juncture would result in an advisory opinion because there is no immediate effect on Petitioners. In the proceedings below, the Corporation Commission regulated a public utility, Virginia Power, in a ratemaking proceeding. Its ruling directly affects Virginia Power, not the Petitioners. Since no tribunal has addressed and resolved whether any contract reformation is necessary as a result of the Corporation Commission's decision, that issue is not properly before the Court.

motion to dismiss for lack of subject matter jurisdiction. The Court of Appeals for the Third Circuit reversed the district court, finding that the BRC's action was preempted by federal law. *Id.* at 1182, 1194.

In *Freehold Cogeneration Associates*, the QF and the utility had freely negotiated the terms of the power purchase agreement. In 1992, the BRC approved the contract which provided for the utility to pay Freehold a rate set at 100% of the utility's 1989 avoided cost. In 1993, due to decreases in the cost of obtaining electrical power, the BRC directed public utilities under its jurisdiction to notify it if any power supply contracts were no longer economically beneficial. After unsuccessful negotiations, the BRC directed Freehold and the utility to renegotiate the purchase rate term or negotiate a buy-out of the purchase contract because the contract was no longer economically beneficial. *Id.* at 1182-83.

The *Freehold Cogeneration Associates* court found that the BRC's actions were "'utility-type' regulation -- exactly the type of regulation from which Freehold is immune under § 210(e) [of PURPA]." *Id.* at 1192. In short, that court concluded that continuous revision of QF contract payments subjected the QF to something akin to utility ratemaking forbidden by PURPA.

In the present case, the Corporation Commission did not subject the Petitioners to "utility-type" regulation. The Corporation Commission only adjusted retail electric rates and adjusted them independently without any attempt to change the Petitioners' contracts with Virginia Power. The BRC in *Freehold Cogeneration Associates* required contracts to be renegotiated to secure more favorable terms, regardless of the validity of those terms at the outset. Any reduction of retail electric rates was to be

based on the renegotiation of the contracts. Electric rates were not adjusted independently of any change in the contract.[7]

The Corporation Commission did not directly regulate QFs; it was acting in a state retail ratemaking proceeding regulating the rates of a public utility, Virginia Power, for service to its retail electric customers. Unlike *Freehold Cogeneration Associates*, the Corporation Commission did not create a program for the public utilities to renegotiate contracts with QFs. Rather, the Corporation Commission acted to prevent the double recovery of an expense from ratepayers.

The Third Circuit, in *Freehold Cogeneration Associates*, indicated that it might have viewed the actions of the Corporation Commission much the same way the Virginia Supreme Court did. The Court, noting that PURPA preempted the BRC's power to order the parties to renegotiate their contract terms, found that there is "[n]o claim of fraud or mutual mistake of fact . . . alleged in the negotiation and execution of the [contract]." *Id.* at 1190. If

---

[7] The Third Circuit concluded in *Freehold Cogeneration Associates* that denial of recovery of the contract payments in electric rates was also preempted. 44 F.3d at 1194. It is clear that this statement flows from the broad intrusion of the BRC into the regulation of the contract payments themselves and the direct redetermination of the avoided costs on which they were based. Neither of these actions occurred in this case. As applied to this case by Petitioners, this statement by the Third Circuit would result in states being without authority to protect electric customers from anything the contracting parties might choose to include in a contract payment even where it is not an avoided cost. In short, states could never disallow anything in rates if it was paid under a PURPA contract. That conclusion would make unnecessary "regulatory out" clauses, like those Petitioners agreed to include in the contracts in question, and would read § 210(b)(1) out of PURPA since there would be no way for a state commission to keep rates just and reasonable to retail customers. Petitioners read the Third Circuit's language much too broadly and out of context.

the BRC had acted to correct a mutual mistake of a fact, the Court apparently would not have concluded that the BRC's actions had been preempted by federal law.

In the Virginia case a mutual mistake of fact occurred. Perhaps the Virginia Commission could have required a contract reformation on that basis, but it chose only to regulate retail electric rates. However, a conclusion that PURPA does not preempt retail rate regulation on the facts of this case is well within the meaning of *Freehold Cogeneration Associates*.

### 2. Petitioners' Cited State Court Rulings Are Also Distinguishable

Petitioners also argue that the rulings in *Smith Cogeneration Management, Inc. v. Corporation Commission*, 863 P.2d 1227 (Okla. 1993) (hereinafter "*Smith Cogeneration*"), and *West Penn Power Co. v. Pennsylvania Public Utility Commission*, 623 A.2d 383 (Pa. Commw. Ct. 1993) (hereinafter "*West Penn*"), are applicable to the case at bar. Both cases can be easily distinguished from the unique situation faced by the Corporation Commission and affirmed by the Virginia Supreme Court.

In *Smith Cogeneration*, Smith Cogeneration Management, Inc. (hereinafter "Smith") requested the Oklahoma Corporation Commission (hereinafter "OCC") to direct an Oklahoma utility to negotiate a power purchase contract for a proposed cogeneration facility. Smith did not have an existing contract with the utility, and, among other things, it wanted the OCC to waive its rule requiring contracts between QFs and utilities to include a provision allowing the OCC to alter the terms of the contract after the contract has been approved. 863 P.2d at 1230-31. The Oklahoma Supreme Court found that the OCC's rule was preempted by PURPA because federal law seeks to "prevent reconsideration of such contracts." *Id.* at 1240.

In the present case, the Corporation Commission did nothing to reconsider the terms of the contracts between Virginia Power and the Petitioners. Rather, it merely prevented Virginia Power from charging to its customers additional expenses caused by an error in those contracts. The Corporation Commission had no rule requiring re-examination of the contracts and did not attempt any such re-examination.

Petitioners cite *West Penn* to support their argument that the Corporation Commission erred in singling out the GRT component and excluding it from avoided costs. In *West Penn*, the court held that, if one element of avoided costs must be recalculated, then all elements must be recalculated. 623 A.2d at 387. However, this ruling is inapplicable to the present case. First, like the other cases cited by Petitioners, *West Penn* is a case which involves state action to reform power supply contracts. This case involves only state ratemaking. Second, the case does not support Petitioners' contention that other elements of the contract payments must be reevaluated in this case.

*West Penn* involved a court order requiring the Pennsylvania Public Utility Commission (hereinafter "PPUC") to recalculate the capacity credit costs reflecting the avoided costs the utility was to pay the QF for energy purchased. The PPUC interpreted the order to require recalculation of only the corporate tax rate component of avoided costs. The Commonwealth Court of Pennsylvania determined that the corporate tax rate, like all elements of avoided cost, was "time sensitive data." Therefore, it was improper for the PPUC to recalculate only one element of avoided costs without recalculating the others using the same time period. *Id.* at 384-88. In the case at bar, however, the GRT element was never properly included in avoided costs. Its exclusion from electric rates was not based on the time at which avoided costs were calculated, but on the fact that it was never an avoided cost. There was no reason to examine the other elements of Virginia Power's contract payments which were avoided costs. *West Penn* is inapposite here.

### 3. There Is No Conflict Between the Virginia Supreme Court and the FERC

Petitioners cite several FERC proceedings asserting that the Virginia Supreme Court's decision in this case conflicts with them. This Court has exercised its discretion to grant certiorari when court decisions are allegedly in conflict with long-standing policies or statutory interpretations adopted by an agency administering a statute. *Morton v. Ruiz*, 415 U.S. 199, 201-02 (1974). No such conflict is raised in the instant case. The Corporation Commission's final order affirmed by the Supreme Court of Virginia addressed a factual situation not previously reached by the FERC. The Virginia decision is consistent with FERC decisions.

In reviewing the FERC's regulations implementing Section 210 of PURPA, this Court approved requiring utilities to purchase electricity from QFs at a rate equal to, but not in excess of, the utility's avoided costs. *American Paper Inst. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 406, 413 (1983). In orders cited by Petitioners, FERC has held that the contract payments paid by a utility for electricity generated by a QF cannot exceed the utility's avoided cost. *Connecticut Light & Power Co.*, 70 F.E.R.C. ¶ 61,012, at 61,028-29 & n.46, *recons. denied*, 71 F.E.R.C. ¶ 61,035 (1995), *appeal docketed sub nom. Niagara Mohawk Power Corp. v. FERC*, No. 95-1222 (D.C. Cir. Apr. 24, 1995); *Southern Cal. Edison Co.*, 70 F.E.R.C. ¶ 61,215, at 61,675-76 & nn.14-15, *recons. granted in part and denied in part*, 71 F.E.R.C. ¶ 61,269 (1995).

The FERC has acknowledged that setting a contract price for electricity purchased from QFs at the utility's avoided costs does not directly benefit ratepayers monetarily.[8] It has, however, identified adverse consequences from setting rates in excess of the

---

[8] The benefits for consumers are indirect in the form of fuel efficiency and energy conservation. *Southern Cal. Edison Co.*, 70 F.E.R.C. ¶ 61,215, at 61,675 & n.8.

utility's avoided costs. The FERC has held that, "a rate in excess of avoided cost is, by definition, a rate higher than what ratepayers would pay if the utility had generated the electric energy itself or purchased it elsewhere." *Connecticut Light & Power Co.*, 70 F.E.R.C. ¶ 61,012, at 61,029 n.46. Capping contract payments at an amount equal to, but not in excess of, the avoided cost balances competing concerns of promoting cogeneration and small power production while avoiding a monetary burden to electric ratepayers. Imposing a payment in excess of avoided cost would subsidize QFs and burden electric ratepayers. *Id. citing Independent Energy Producers Assoc. v. California P.U.C.*, 36 F.3d 848, 858 (9th Cir. 1994).

In the case now before the Court, the contract payments negotiated for some contracts between Virginia Power and QFs reflected costs that were, in fact, not avoided. Virginia Power incurs liability for GRT whenever it sells power to retail customers, whether the power sold is generated by Virginia Power at its facilities, purchased from a QF, or purchased from another source. The negotiated contracts provided for a contract payment that exceeded avoided costs to the extent an unavoidable cost, the GRT, was included. Corporation Commission action to address this factual error was consistent with the principle addressed in the FERC decisions: that utilities cannot be required to pay more than avoided costs. Here, an unavoidable cost was included in the then-current calculation of avoided costs. That calculation, therefore, overstated the avoided cost estimate by the amount of the unavoidable cost, the GRT.

Petitioners point to several recent FERC decisions to support their argument that FERC has a prohibition on state reconsideration of avoided costs calculations, regardless of acknowledged error. (Pet. at 26-27.) A review of the FERC

decisions cited by the Petitioners shows quickly that any bar to review which FERC has established did not apply to the Virginia proceedings.

The Corporation Commission's decision arose out of a factual and procedural posture far different from the FERC proceedings identified in the Petition. In *Connecticut Light & Power Co.* and *Southern California Edison Co.*, state regulatory agency action or state statute fixed avoided cost and the payments made by a utility to a QF for electricity. In each case utilities sought relief from the terms of their power supply contracts with the QFs or sought to avoid signing a contract. FERC stated, "We believe the appropriate time in which to challenge a state-imposed rate for a QF purchase is up to the time the purchase contract is signed, not years into a contract." *Southern Cal. Edison Co.*, 70 F.E.R.C. ¶ 61,215, at 61,678; *accord Connecticut Light & Power Co.*, 70 F.E.R.C. ¶ 61,012, at 61,029.

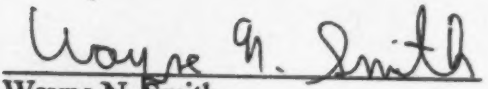
However, there is no state attempt to reform power supply contracts here. Only state ratemaking is involved. Contract reformation, if any, is left to agreement of the parties or future litigation. Thus, there is no conflict with any of these FERC decisions.

## CONCLUSION

The Corporation Commission respectfully urges the Court to deny the Petition for Writ of Certiorari. This case is solely a matter of state ratemaking authority based on narrow facts, not broad PURPA policy. There is no conflict between the decision of the Supreme Court of Virginia affirming the Corporation

Commission's disallowance of certain expenses incurred by Virginia Power and the various decisions of other courts and the FERC.

Respectfully submitted,



Wayne N. Smith
Senior Counsel
*(Counsel of Record)*

Stewart E. Farrar
Solicitor General
Anthony J. Gambardella
General Counsel
Vishwa B. Bhargava
Attorney
State Corporation Commission
P.O. Box 1197
Richmond, Virginia 23209-1197
(804) 371-9671

Dated: June 30, 1995